

Harold and Ima Jean Grubbs (hereinafter “Grubbs”) appeal a judgment against them on a promissory note, arguing there was no consideration for the note or, in the alternative, there was a failure of consideration. Because Grubbs received consideration in exchange for the note, we affirm.

FACTS

In September 1996, Grubbs and Holiday Inn entered into a franchise and licensing agreement pursuant to which Grubbs would operate a Holiday Inn in Covington, Indiana. Grubbs executed a promissory note for \$26,500, which note was modified in October of 1997 to permit Grubbs more time to pursue financing for the hotel. The modification provided, among other things, that Grubbs would pay \$2,500, due the first day of each month, for three consecutive months beginning October 1, 1997.¹

On November 9, 1997, Grubbs paid \$2,500 on the note. Holiday Inn approved the franchise agreement and granted Grubbs a license to operate the hotel for ten years if the promissory note was paid in full and other licensing obligations were met. Harold Grubbs testified he had previously paid Holiday Inn \$1,200 as “the down payment on the original Franchise Agreement.” (Tr. at 10.) He testified Holiday Inn’s representative “agreed to go ahead and do the franchise, and we agreed to do it, and we give [sic] him the check to bind that.” (*Id.* at 12.) The promissory note would become due if Grubbs defaulted under the license agreement. Grubbs was not able to obtain financing and

¹ The record before us reflects the original note was due November 1, 1996, just four days after it was executed. It also reflects the first monthly payment under the modification was due two days before the modification was executed, and the modification was not executed until about a year after the original note might have been in default. Neither party acknowledges or explains this unusual sequence of events, nor does either party argue the apparent delay or non-enforcement has a bearing on the outcome of this dispute. We accordingly do not address that matter.

Holiday Inn eventually awarded the franchise to someone else. It sued Grubbs for the amount due on the promissory note.

DISCUSSION AND DECISION

When reviewing a general judgment we affirm the trial court if its judgment can be sustained on any legal theory supported by the evidence. *Red Arrow Ventures, Ltd. v. Miller*, 692 N.E.2d 939, 946 (Ind. Ct. App. 1998), *trans. denied* 706 N.E.2d 169 (Ind. 1998). We consider only the evidence most favorable to the judgment together with all reasonable inferences drawn therefrom. *Id.* When the trial court does not make findings of fact we presume its judgment is based on findings supported by the evidence. *Id.*

Grubbs' note mentions no specific consideration, but instead includes boilerplate language that the promise to pay the note is made in exchange "FOR VALUE RECEIVED." (App. at 8) (capitalization in original). Where a promissory note recites no consideration except "for value received," "the real consideration of the note may be inquired into as far as may be necessary to the [failure of consideration] defense pleaded." *Gentile v. Bower*, 477 S.E.2d 130, 133 (Ga. Ct. App. 1996) (quoting *Dunson & Bros. Co. v. J.C. Smith Seed Co.*, 106 S.E. 914 (Ga. Ct. App. 1921)). *See also Powell v. Nusbaum*, 192 Ind. 358, 136 N.E. 571, 572 (1922) (when consideration for a deed is stated in general terms, either party may show by parol or documentary evidence the true consideration for its execution).²

² Grubbs and Holiday Inn disagree whether our analysis is controlled by Indiana law or Georgia law. Grubbs points to the language of the Note: "This Note shall be construed and enforceable in accordance with the laws of the State of Georgia." (App. at 9.) Holiday Inn argues Grubbs "waived" the application of Georgia law by failing to raise it before the trial court.

Grubbs and Holiday Inn both testified the consideration for the note was the grant of the franchise to Grubbs. Harold Grubbs was asked, “And, in signing the Promissary [sic] Note, you knew that you were promising to pay, in exchange for the franchise, \$26,500.00, correct?” (Tr. at 17.) He responded, “That is correct, if we’d . . . I mean, if we pay that then we will receive the franchise.” (*Id.*) Grubbs was asked, “And, by your actions of not paying, you basically let that license expire, correct?” (*id.* at 32), and he replied, “Yes.”³ (*Id.*)

Grubbs does not argue the grant of a franchise cannot serve as consideration for a promissory note, and we decline to so hold. *See, e.g., Mantell v. Int’l Plastic Harmonica Corp.*, 55 A.2d 250, 256 (N.J. Eq. 1947). We therefore cannot say the trial court erred to the extent it determined the agreement between Grubbs and Holiday Inn was supported by consideration. We accordingly affirm.

It appears the parties are asking us to review only whether there was consideration for the note, and consideration is an element of a contract in both states. *See, e.g., Paint Shuttle, Inc. v. Cont’l Cas. Co.*, 733 N.E.2d 513, 523 (Ind. Ct. App. 2000), *trans. denied* 753 N.E.2d 5 (Ind. 2001); *Lee v. Green*, 126 S.E.2d 417, 418 (Ga. 1962). We accordingly need not decide the choice-of-law question.

³ Grubbs asserts in his reply brief he “understood” (Reply Br. of Appellants at 1) his obligation to pay the note was contingent on an exclusive franchise and on financing. We decline his invitation to reweigh the evidence before the trial court.

The dissent asserts the Grubbses in essence received nothing for the promissory note. This suggests Holiday Inn did not grant the franchise to the Grubbses but instead arbitrarily granted it to someone else later. The record in fact reflects Holiday Inn approved the franchise agreement and granted Grubbs a license to operate the hotel, which license the Grubbses allowed to expire by their non-payment.

The dissent also states “The Grubbses were . . . promised financing that did not come about” Harold testified a Holiday Inn representative told him a Holiday Inn franchise was like a McDonald’s franchise, in that “[y]ou can go to any bank and get the money, and he had several lenders who would do that.” (Tr. at 15-16.) We decline to hold a statement by a franchisor that a prospective franchisee “can go to any bank and get the money” represents a franchisor’s promise of financing.

Affirmed.

SULLIVAN, J., concurs.

BAKER, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

HAROLD GRUBBS and IMA JEAN GRUBBS,)	
)	
Appellants-defendants,)	
)	
vs.)	No. 83A05-0512-CV-704
)	
HOLIDAY INN FRANCHISING, INC.,)	
)	
Appellee-Plaintiff.)	

Baker, Judge, dissenting.

I respectfully dissent from the majority's decision to affirm the trial court's judgment against the Grubbses.

At trial, Harold testified that he was promised an exclusive franchise where "no one is going to come in and build one right next to you," tr. p. 23, but the Agreement does not reflect this promise. The Grubbses were also promised financing that did not come about, and Holiday Inn granted the franchise to another party. In essence, the Grubbses received nothing for the promissory note.

Additionally, I note that the Agreement did not mention the promissory note. It is apparent to me that the consideration for the Agreement, i.e., the grant of the License, is the Franchisee's promise to pay the fees and royalties and otherwise comply with the

quality and other standards and covenants in the Agreement. In light of the merger clause contained in the Agreement, the promissory note should not be added to the list of promises given by the Grubbses in exchange for the grant of the License under the Agreement. And Georgia law⁴ recognizes the effect of a merger clause to bar consideration of evidence at odds with the terms of an integrated written agreement. First Data POS, Inc. v. Microbilt Corp., 546 S.E.2d 781, 796 (Ga. 2001).

In sum, the admissible parol evidence leads to the conclusion that the promissory note was separate and apart from the Agreement and was given in exchange for a fully financed, operating hotel with an exclusive license. Because Holiday Inn provided none of these things, consideration for the promissory note failed and, therefore, the trial court's judgment was contrary to law. Thus, I would reverse the trial court's judgment for Holiday Inn.

⁴ A Georgia "choice of law" clause is included in the Agreement. Similarly, our courts apply the parol evidence rule to bar extrinsic evidence of the terms of an instrument complete on its face. See I.C.C. Protective Coatings v. A.E. Staley Mfg. Co., 695 N.E.2d 1030, 1035 (Ind. Ct. App. 1998).